Supreme Court, U. S.
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IN THE
SUPREME COURT of the UNITED STATES
OCTOBER TERM, 1979

NO. 79-274

ROBERT MOYE,

Petitioner,

v.

STATE OF CONNECTICUT,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO
THE SUPREME COURT OF THE
STATE OF CONNECTICUT

JOHN R. WILLIAMS,
SUE L. WISE
WILLIAMS & WISE
265 Church Street
New Haven, Conn.

Counsel for Petitioner

July 25, 1979

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PETITION FOR A WRIT OF CERTIORARI TO
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The petitioner, Robert Moye, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Supreme Court of the State of Connecticut entered in this proceeding on May 15, 1979.

OPINION BELOW

The opinion of the Supreme Court of the State of Connecticut is reported in Vol. XL Connecticut Law Journal, No. 46, May 15, 1979, pp. 1-10 and appears in the Appendix hereto. The judgment of the Superior Court of the State of Connecticut appears in the Appendix hereto.

JURISDICTION

The opinion of the Supreme Court of the State of Connecticut was entered on May 15, 1979. A timely motion to reargue was denied on May 31, 1979, and this petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1257 (3).

QUESTIONS PRESENTED

1. Whether or not the decision of the Supreme Court of the State of Connecticut conflicts with the decision of this Court in Sandstrom v. Montana, U.S. (1979).

2. Whether or not the petitioner was denied the protections of the presumption of innocence and due process of law when

the Supreme Court of the State of Connecticut approved the trial court's instruction to the jury that it was to presume the petitioner intended the natural and necessary consequences of his acts.

CONSTITUTIONAL PROVISION INVOLVED

CONSTITUTION OF THE UNITED STATES,

AMENDMENT XIV:

Section 1. . . . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

On April 19, 1975 Thomas McDuffie was shot and killed by Robert Moye. Moye was indicted by a grand jury for the crime of murder in violation of §53a-54a of the General Statutes of Connecticut:

> (a) A person is guilty of murder when, with intent to cause the death of another

> person, he causes the death of such person. . . .

At a trial to a jury, defendant Moye, the petitioner herein, admitted that he had shot McDuffie, but insisted that the shooting was not intentional. Moye claimed, and evidence was introduced which supported his claim, that he was twirling a gun when it fired accidentally. The issue of intent, therefore, was of paramount importance and was the primary dispute between the State and the defendant.

Despite the fact that the question of intent was virtually the only issue before the jurors, the trial court instructed the jury as follows:

> Now, the defendant testified and he stated to you clearly, as all of the other witnesses that were there, that the defendant shot and killed the deceased, Thomas McDuffie. So it seems to me you have no great difficulty with that element of the crime. The defendant did shoot him. The real question on the charge of murder is the question of intent. Did he

> intend to do it or was it an accidental shooting as the defendant claims. Now, intent is a mental process. A person's intention may be inferred from his conduct. Every person is presumed to intend the natural and necessary consequences of his own actions.
>
> (Appendix pp. 2c-3c)

The jury returned a verdict of guilty and the defendant was sentenced to a term of not less than eighteen (18) years to life in prison (Appendix, pp. 1b-3b.) The defendant appealed his conviction to the Supreme Court of the State of Connecticut and tendered, inter alia, the issue of the constitutionality of this portion of the charge. The defendant in his appeal to the Connecticut Court argued that the instruction impermissibly shifted the burden of proof of the essential element of intent from the State to the defendant and thereby denied him the protection of the presumption of innocence and due process of law.

The Supreme Court of the State of

Connecticut reached the question tendered, but held that the language of the instruction was permissible in light of the "fact that the charge was balanced by other portions clearly delineating the state's burden of proof. . . ." See pp. 2a-8a of Appendix hereto.

REASON FOR GRANTING THE WRIT

The Decision of the Supreme Court of the State of Connecticut is in Direct Conflict with this Court's Decision in Sandstrom v. Montana, U.S. (1979).

Less than two months ago, in Sandstrom v. Montana, U.S. (June 18, 1979), this Court held that the jury instruction, "the law presumes that a person intends the ordinary consequences of his voluntary acts" unconstitutionally shifted the burden of proof of an essential element of the crime of murder from the State to the defendant thereby depriving the defendant of the protections of the presumption of innocence and due process of law. (Slip opinion pp. 3-14)[1]

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1 In so holding, this Court relied, in part, on its decision in United States v. United States Gypsum Co., 438 U.S. 422 (1978) where it had disapproved the jury

The factual similarities between the Sandstrom case and the case at bar are compelling; both suffer the same constitutional infirmities; both convictions must be set aside.

In Sandstrom and Moye, each defendant admitted shooting the victim: Sandstrom claimed that chronic alcoholism prevented him from forming the requisite intent to "purposefully or knowingly" kill Annie Jessen (Slip opinion, at 2); Moye claimed that the shooting of Thomas McDuffie had been purely accidental and completely unintentional (Appendix, p. 3a, 6c, infra). Thus, in both Sandstrom and Moye, because of similar fact patterns, the State had to prove only the crucial question of intent. Clearly, in both cases, intent was the sole element of the crime of murder which was in issue before the jury.[2]

instruction, "the law presumes that a person intends the necessary and natural consequences of his acts." Id., at 430.

2 The Connecticut Supreme Court considered it well-settled state law that "under [Connecticut] General Statutes §53a-54a(a) the State must prove beyond a reasonable doubt that an accused possessed the specific intent to cause death because intent to achieve this end is an essential element of the crime. [cites omitted]" (Appendix, p. 5a, infra.)

However, in both cases the trial court relieved the State of its burden of proving the element of intent by improperly charging the jury that they were free to presume the essential element of intent from other facts that had been proved. In Sandstrom the trial court unconstitutionally shifted the burden of proof by allowing the jury to presume that Sandstrom intended "the ordinary consequences of his voluntary acts"; in Moye, the jury was told, in language virtually identical to the instructions disapproved in United States v. United States Gypsum Co., 438 U.S. 422 (1978) that "every person is presumed to intend the natural consequences of his own actions" (Appendix, p. 2a, infra.)[3]

Neither the Sandstrom instruction nor the Moye instruction can pass constitu-

3 "...the law presumes that a person intends the necessary and natural consequences of his acts." United States v. United States Gypsum Co., note 1, infra. Despite slight word variation the instructions in Sandstrom, Gypsum and Moye are fungible in purpose and meaning.

tional muster. These instructions allow the jury to presume intent from proven facts; they allow the actus rea to prove the mens rea. The notion that an essential element of a crime can be presumed merely by the proof of other facts or elements was condemned more than twenty-five years ago by this Court in Morissette v. United States, 342 U.S. 246 (1952). That doctrine was given new vitality last year in United States v. United States Gypsum Co., supra. Furthermore, this Court found in Gypsum that such an instruction invaded the fact-finding function of the jury, thereby, relieving the State of its constitutional obligation to prove each and every element of the crime charged beyond a reasonable doubt. In re Winship, 397 U.S. 358 (1970).

And, lastly, such instructions impermissibly shift the burden of proof of an essential element of a crime from the State to the defendant in violation of the doctrines of Mullaney v. Wilbur, 421 U.S. 684 (1975) and Patterson v. New York, 432 U.S. 197 (1977).

The rationales of these cases converge in Sandstrom v. Montana, supra, to

support an explicit holding that this species of instruction--an instruction where the jury is asked to presume intent--is unconstitutional under the due process clause of the Fourteenth Amendment. Therefore, Sandstrom mandates the reversal of the decision of the Supreme Court of the State of Connecticut.

The petitioner tendered to the Connecticut Supreme Court the very constitutional issues and arguments subsequently squarely decided by this Court in Sandstrom. The Supreme Court of Connecticut reached the question, but ignored petitioner's arguments and strained to reach a result wholly inconsistent with Mullaney, Gypsum and Winship. The decision of the court below is totally at odds with Sandstrom, the presumption of innocence, and the Fourteenth Amendment.

Not only did the Connecticut court completely ignore this Court's reasoning regarding the instruction in Gypsum, but it also lamely distinguished a similar disfavored instruction which the Court of Appeals for the Second Circuit had condemned in United States v. Robinson, 545 F.2d 301 (2d Cir., 1976). Instead of

heeding the clear direction and the constitutional principles implicit in these and other cases[4], the Connecticut court, split hairs and found that the language of the charge in Moye was not exactly the language condemned in United States v. Robinson, supra. This hypertechnical, semantic approach leads nowhere but to the spurious conclusion that the charge is merely "confusing" or that it can be saved by eliminating the clause, "unless the evidence of a case leads you to a contrary conclusion." (See Appendix, pp. 6a, 7a, infra.)

Similarly, the conclusion of the Connecticut court that the instruction is permissible because the remainder of the trial court's "charge was balanced" (Appendix, p. 8a, infra) is directly contrary to the Sandstrom principle that the

4 United States v. Chiantese, 560 F.2d 1233 (5th Cir. 1977); United States v. Diggs, 527 F.2d 509 (8th Cir. 1975); United States v. Woodring, 464 F.2d 1248 (10th Cir. 1972); United States v. Wilkins, 385 F.2d 465 (4th Cir. 1967); Cohen v. United States, 378 F.2d 751 (9th Cir. 1967); United States v. Releford, 352 F.2d 36 (6th Cir. 1965); Menard v. State, Alaska, 578 P.2d 966 (1978).

instruction is fatally flawed if there is a possibility that a "reasonable juror could have given the presumption conclusive or persuasion-shifting effect." (Slip opinion, pp. 8, 15, 16.)[5]

Simply stated, the Connecticut court failed to recognize the constitutional significance and far-reaching implications of United States v. United States Gypsum Co., supra, and, thus failed to appreciate the constitutional infirmities of the instruction.

In short, the fact pattern and the legal problems raised in Sandstrom are the

5 The Connecticut court, in relying on the "balance" test of United States v. Garrett, 574 F.2d 778 (3d Cir. 1978), ignored that both the Fifth and the Third Circuit had abandoned the ad hoc, curative language approach to reviewing similar cases as wasteful of judicial time. These Circuits had prohibited use of the instruction commonly-known as the Mann instruction. "As a general rule it is reasonable to infer that a person intends all the natural and probable consequences of an act...." Mann v. United States, 319 F.2d 404 (5th Cir. 1963)(emphasis added.) The instructions in Sandstrom and Moye are more constitutionally offensive because of the use of the word "presume" rather than "infer." See Sandstrom v. Montana, supra, n. 7.

factual and legal issues raised in Moye; Moye v. Connecticut is on all fours with Sandstrom v. Montana; the two conflicting decisions are diametrically opposed and cannot be reconciled. It is the mandate of this Court to eliminate such blatant conflicts in our constitutional law and in our criminal courts.

The conflict between the State of Connecticut's highest court and this court justifies the grant of certiorari to review the judgment below.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Supreme Court of the State of Connecticut.

Respectfully submitted,

JOHN R. WILLIAMS
265 Church Street
New Haven, Ct. 06510
(203)562-9931

SUE L. WISE
265 Church Street
New Haven, Ct. 06510
(203)562-9931

DATED: August 13, 1979

APPENDIX A

S U P R E M E C O U R T

December Term, 1978

STATE OF CONNECTICUT v. ROBERT MOYE

COTTER, C. J., LOISELLE, BOGDANSKI, LONGO and PETERS, Js.

Argued December 12, 1978-decision released May 15, 1979

Indictment charging the defendant with the crime of murder, brought to the Superior Court in New Haven County and tried to the jury before Stapleton, J.; verdict and judgment of guilty and appeal by the defendant. No error.

John R. Williams, with whom, on the brief, was Sue L. Wise, for the appellant (defendant).

Ernest J. Diette, Jr., assistant state's attorney, with whom, on the brief, were Arnold Markle, state's attorney, and John J. Kelly, assistant state's attorney, for the appellee (state).

LOISELLE, J. The defendant, Robert Moye, was indicted by a grand jury for the crime of murder in violation of §53a-54a (a) of the General Statutes. Upon a trial

to the jury, the defendant was found guilty as charged. From the judgment rendered on the verdict, the defendant has appealed to this court.

The claims the defendant has raised on this appeal are that the court erred (1) in its charge on intent; (2) in allowing testimony related to the defendant's postarrest silence; (3) in admitting evidence of prior bad acts and criminal conduct by the defendant; (4) in failing to grant the defendant's motion to suppress; and (5) in refusing to grant the defendant's motion to set aside the verdict.

The defendant's first claim is that the trial court's instruction on intent denied him the protection of the presumption of innocence and due process of law. His objection is directed to the following portion of the charge: "Every person is presumed to intend the natural and necessary consequences of his own actions." He contends that this instruction shifted the burden of proof of the essential element of intent from the state to him in violation of Patterson v. New York, 432 U.S. 197, 97 S.Ct. 2319, 53 L. Ed.2d 281 (1977); Mullaney v. Wilbur, 421 U.S. 684, 95 S.Ct. 1881, 44 L.Ed.2d 508

(1975); and In re Winship, 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970).

Defense counsel failed to request a charge on this issue or to except to the charge that was given. Such an omission ordinarily would preclude us from reviewing the claimed error. See Practice Book, 1978, §§315, 3063; State v. Fredericks, 154 Conn. 68, 72, 221 A.2d 585 (1966); State v. Rafanello, 151 Conn. 453, 456, 199 A.2d 13 (1964). An exception to this rule, however, permits a claim to be raised for the first time on appeal where it involves the defendant's constitutional right to a fair trial. State v. Adams,

Conn. (40 Conn.L.J., No. 11, pp. 3,4) (1978); State v. Hauck, 172 Conn. 140, 148, 374 A.2d 150 (1976); State v. Evans, 165 Conn. 61, 69-70, 327 A.2d 576 (1973). This assignment of error, if correct, would amount to such a deprivation; see Cool v. United States, 409 U.S. 100, 93 S. Ct. 354, 34 L.Ed.2d 335 (1972); and will therefore be considered.

The defendant admitted the shooting and killing of Thomas McDuffie, but insisted that the shooting was not intentional. He claimed that he was twirling a gun and it went off accidentally while both were

in the defendant's apartment. The issue of intent, therefore, was paramount in this case.

"'The test to be applied to any part of a charge is whether the charge considered as a whole presents the case to the jury so that no injustice will result.' State v. Mullings, 166 Conn. 268, 275, 348 A.2d 645; Siladi v. McNamara, 164 Conn. 510, 515, 325 A.2d 277. It is well established that individual instructions are not to be judged in artificial isolation from the overall charge. State v. Crawford, 172 Conn. 65, 69, 372 A.2d 154; State v. Ralls, 167 Conn. 408, 422, 356 A.2d 147." State v. Roy, 173 Conn. 35, 40, 376 A.2d 391 (1977); see also Cupp v. Naughten, 414 U.S. 141, 94 S.Ct. 396, 38 L.Ed.2d 368 (1973). The issue then is whether the charge taken as a whole was correct in law and sufficient for the instruction of the jury. Filakosky v. Valente, Conn. (39 Conn. L.J., No. 47, pp. 1, 3) (1978).

It is unquestioned that under General Statutes §53a-54a(a) the state must prove beyond a reasonable doubt that an accused possessed the specific intent to cause death because intent to achieve this end

is an essential element of the crime charged. State v. Holley, 174 Conn. 22, 25-26, 381 A.2d 539 (1977); State v. Bzdyra, 165 Conn. 400, 403, 334 A.2d 917 (1973). "Since a determination of the defendant's intent involves an examination of his mental state, however, it necessarily must be proved by his statements or actions. State v. Sober, 166 Conn. 81, 93, 347 A.2d 61; State v. Cofone, 164 Conn. 162, 164, 319 A.2d 381; State v. Mazzadra, 141 Conn. 731, 735, 109 A.2d 873. 'Intent may be, and usually is, inferred from conduct'; State v. Cofone, supra." State v. Holley, supra, 25-26. This court in some of its opinions has stated that every person is conclusively presumed to intend the natural and necessary consequences of his acts; State v. Holley, supra, 26; State v. Smith, 157 Conn. 351, 354, 254 A.2d 447 (1969); but it has never ruled on the issue raised in this appeal-the constitutionality of the use of this presumption in the charge to the jury.

The defendant claims that this charge impermissibly shifted the burden of proof in violation of Mullaney and Patterson. In United States v. Robinson, 545 F.2d 301, 305-306 (2d Cir. 1976), the Second

Circuit Court of Appeals decided that the "natural and probable consequences" charge was reversible error and reiterated its continued disapproval of this charge on the ground that it appeared to shift the burden of proof. It should be noted, however, that the charge under fire in Robinson was coupled (p. 305) with the phrase: "So, unless the contrary appears from the evidence, the jury may draw the inference that the defendant intended all the consequences which one in like circumstances and possessing like knowledge should reasonably have expected to result from any act knowingly done or knowingly omitted by the defendant." It is the combination of the two phrases which the Second Circuit Court of Appeals found to magnify the potential for burden shifting. United States v. Robinson, supra, 306. Where the second part of the instruction, "unless the contrary appears from the evidence," was not included in the charge, as is the case in this appeal, the courts have disapproved of the charge but have not found reversible error, if sufficient additional instructions on the issue of intent were given to ensure that the jury understood which side had the burden of proof. See

United States v. Erb, 543 F.2d 438, 447 (2d Cir. 1976); United States v. Barash, 365 F.2d 395, 402-403 (2d Cir. 1966). In Mann v. United States, 319 F.2d 404 (5th Cir. 1963), cert. denied, 375 U.S. 986, 84 S.Ct. 520, 11 L.Ed.2d 474 (1964), on which the defendant has relied heavily, the court found plain error because the instruction complained of there was coupled with the phrase "unless the contrary appears from the evidence."

In United States v. Garrett, 574 F.2d 778, 781-82 (3d Cir.), cert. denied, 436 U.S. 919, 98 S.Ct. 2265, 56 L.Ed.2d 759 (1978), the court commented that part of the charge had the potential of "confusing" the jury, but found nevertheless that the charge as a whole, which included instructions on the presumption of innocence, the burden of proving guilt beyond a reasonable doubt, the defendant's and prosecution's respective responsibilities for producing evidence, proving intention and calling witnesses, fully informed the jury of the government's burden of proof on the question of intent. Further, it found (p. 782) that the "natural and probable consequences" charge, without the "unless the evidence of a case leads you to a con-

trary conclusion" clause, was not improper.

In this regard, the Superior Court in the present case charged the jury on the presumption of innocence, the burden upon the state to prove the defendant guilty beyond a reasonable doubt, and the burden upon the state to prove every essential element of the crime charged beyond a reasonable doubt. The court also charged shortly after the "natural and necessary consequence" statement that "the only way in which a jury can determine what a person's purpose or intention was at any given time, and from his own testimony, is by determining what his conduct was and what the circumstances were surrounding that conduct and from these infer or conclude what his purpose or intention was."

In view of the fact that the charge was balanced by other portions clearly delineating the state's burden of proof, and that it was not coupled with the more prejudicial portion mentioned above, the charge did not deprive the defendant of any fundamental constitutional right or a fair trial.

The defendant's second assignment of error is that the trial court infringed on his fifth and sixth amendment rights to silence and to the assistance of counsel by permitting the state to prove that the defendant, during police interrogation, had invoked his right to remain silent after consulting with his attorney, and that the defendant's attorney had objected to certain testing procedures conducted at police headquarters. The second half of this claim is addressed first.

The defendant's argument is that the prosecution violated his constitutionally protected right to counsel by eliciting, on cross-examination of one of the detectives involved in the investigation, that defense counsel had objected to the performance of a neutron test on the defendant's hands. The defendant's claim is that the introduction of this testimony was an abridgement of his constitutional right to counsel, which, taken in conjunction with the testimony that he relied on the advice of counsel in ceasing to give his statement, amounted to a pattern on the part of the prosecution of eliciting evidence of constitutionally protected conduct that would prejudice the jury

against him.

The defendant, however, makes only passing reference to this incident in his brief. He also concedes in a footnote to his brief that trial counsel failed to object properly to this testimony. He contends, however, that the introduction of this evidence presents a question of constitutional magnitude and thus must be considered on appeal even though not properly preserved below. State v. Mastropetre, Conn. (40 Conn.L.J., No. 5, pp. 4, 8) (1978); State v. Evans, 165 Conn. 61, 70, 327 A.2d 576 (1973). As mentioned above, under Evans this court in the most "exceptional circumstances" will review a claimed error "where the record adequately supports a claim that a litigant has clearly been deprived of a fundamental constitutional right and a fair trial." State v. Evans, supra, 70. Here, the defendant claims he has been deprived of his sixth amendment right to counsel. He neglects, however, to substantiate his claim. Not only does he fail to relate what the testimony was to which he is objecting, but he does not even indicate where in the transcript the error occurred and who gave the testimony. This failure to present an

adequate record for what the defendant claims is an error of constitutional dimension makes it impossible for this court to consider that claimed error, not simply as a matter of procedure; Practice Book, 1978, §§3054 (c)(3), 3063; State v. Weston, 164 Conn. 635, 636, 325 A.2d 457 (1973); State v. Grayton, 163 Conn. 104, 109, 302 A.2d 246, cert. denied, 409 U.S. 1045, 93 S.Ct. 542, 34 L.Ed.2d 495 (1972); State v. Benson, 153 Conn. 209, 217, 214 A.2d 903 (1965); but because counsel has not presented us with anything of substance we can consider.

The defendant covers at great length, however, his claim that the introduction of testimony that he ceased giving a postarrest statement to police on advice of counsel was an infringement of his fifth and sixth amendment rights to silence and to the assistance of counsel.

The complete scenario is important in determining whether the testimony was, as claimed, a violation of the constitutional prohibition against the use of postarrest silence for impeachment purposes, as enunciated by the United States Supreme Court in Doyle v. Ohio, 426 U.S. 610, 96 S.Ct. 2240, 49 L.Ed.2d 91 (1976), and by this

court in State v. Cook, 174 Conn. 73, 76, 381 A.2d 563 (1977), and State v. Ferrone, 97 Conn. 258, 266, 116 A. 336 (1922).

As with several of the other claims made in this appeal, the defendant did not raise this issue at trial, but has asserted that this court must review it under State v. Evans, supra, as it is of constitutional magnitude. We agree that the defendant has couched a claim in constitutional terms and the record is sufficient to allow us to review it. From examining the transcript, however, it is obvious that the defendant's constitutional argument is erected on quicksand facts. The law is as the defendant presents it. Doyle v. Ohio, supra, clearly states that it is a violation of due process for the prosecution to introduce an accused's silence, at the time of arrest and after receiving Miranda warnings, for the purpose of impeachment. In State v. Cook, supra, this court held (p. 76) that "[w]here, however, the accused is in custody, 'our law accords him the right to reply to question or statement, or to remain silent. His silence under such circumstances cannot be laid in evidence against him.' State v. Ferrone, 97 Conn.

258, 266, 116 A. 336."

References to one's invocation of the right to remain silent is not always constitutionally impermissible, however. Testimony relating to a defendant's invocation of his right to remain silent is admissible to prove the adequacy of the Miranda warnings. State v. Ralls, 167 Conn. 408, 427-29, 356 A.2d 147 (1974). It "could be used by the prosecution to contradict a defendant who testifies to an exculpatory version of events and claims to have told the police the same version upon arrest. In that situation the fact of earlier silence would not be used to impeach the exculpatory story, but rather to challenge the defendant's testimony as to his behavior following arrest." Doyle v. Ohio, supra, 619 n.11; see also United States v. Gambina, 564 F.2d 22, 25 (8th Cir. 1977); United States v. Fairchild, 505 F.2d 1378, 1383 (5th Cir. 1975).

The testimony to which the defendant is objecting was elicited by the prosecutor from Detective Melvin Wearing, one of the arresting officers. The state introduced it in its case in chief. Detective Wearing testified as follows: "Q. And did you start to take a statement from

him? A. Yes. Q. Did you complete the statement? A. No, I didn't. Q. And why was that? A. Because we were interrupted by Attorney [Earl] Williams. Q. And would you indicate the circumstances under which that occurred? A. I was in the process of taking-taking a dictated statement from Mr. Moye and Attorney Williams came into the Investigator's Service Unit and told Mr. Moye not to give me a statement, to discontinue it. Q. Did you stop at that time questioning him? A. Yes, I did."

The defendant's trial counsel did not object to the introduction of this testimony. If this were the only testimony on the subject, it would seem likely the failure to object was a mistake on the part of trial counsel, brought on by inadvertence or inattention. But trial counsel himself on two separate occasions introduced testimony relating to the partial statement issue: he brought it up shortly thereafter on his cross-examina-

tion of Detective Wearing[1] and raised the issue again on his own direct examination of the defendant.[2] Counsel's decision not to object, coupled with his raising of the

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1 "[By Attorney Earl Williams] Q. Now, at the police station Mr. Moye signed a Miranda warning statement?
A. That's correct.
Q. And you told him verbally he did not have to make any statement?
A. That's true.
Q. And he continued to make a statement, is that correct?
A. Yes.
Q. Did he again repeat to you that the shooting was accidental after you had warned him?
A. Yes.
Q. And at the time he came to the police station, was he freely telling you what had happened?
A. Yes. He was in the process of giving me a statement to exactly what occurred."

2 "[By Attorney Earl Williams] Q. At some point in time did they ask you to come down to the station to give a statement?
A. Yes, they did. They asked me to go down.
Q. And did you go?
A. Yes, I went down.
Q. And when you arrived at the station, did they ask you to give a formal statement?
A. Yes, they did.
Q. The police did?
A. Yes, sir.
Q. Did you in fact give a formal

issue on two separate occasions and his acquiescence in the offering of the unfinished exculpatory statement as an exhibit by his voluntary "I have no objection to this statement," unequivocally indicate that it was a deliberate tactical choice on his part to use this evidence to the defendant's benefit. The defendant never denied he shot the decedent; his defense was that it was an accident. Thus, it is logical to conclude that counsel was using this testimony of cooperativeness to establish this defense, expecting the jury to infer from the defendant's ready coop-

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statement to the police. I mean a written statement?

A. I was--I was giving one to them.

Q. You were in the process of giving a formal statement?

A. Yes, I was.

Q. But did you stop giving a statement to the police?

A. Yes, sir, I did.

Q. Why?

A. Because you told me to.

Q. You had called me as your lawyer, is that correct?

A. That's right.

Q. Do you recall what the police charged you with that night?

A. Assault."

eration that he had nothing to hide, that he lacked criminal intent and that the shooting was an accident.

As far as the initial introduction of the testimony by the state is concerned, the testimony that the defendant was voluntarily giving a formal, exculpatory written statement at police headquarters but stopped upon the advice of his attorney was not used to impeach the defendant's credibility--the forbidden purpose in Doyle v. Ohio, supra. The evidence was presented by the state to show the investigative effort made by the police and the sequence of events as they unfolded (an acceptable purpose under State v. Ralls, supra). Moreover, the fact of cessation of his statement was clearly not being used against him as any indication of silence in the face of accusation. Neither was the same offered to impeach the testimony of the defendant in any way. See Doyle v. Ohio, supra, 619 m.10. Nor does the appellate counsel, who was not the trial counsel, suggest in any way that the defendant's testimony was impeached or that in any manner the cessation of his exculpatory statement was ever used by the state for impeachment purposes either in

evidence, by argument, or by inference other than by abstract reference to the legal principles involved. The state's introduction of the testimony was for permissible purposes. Moreover, the defendant's tactical use of it amounted to a waiver of any constitutional objection. Fay v. Noia, 372 U.S. 391, 83 S.Ct. 822, 9 L.Ed.2d 837 (1963).

The defendant's third claim of error is that he was denied due process of law because the court admitted a large volume of irrelevant and prejudicial evidence which attacked his character. He claims that the totality of the admitted evidence of his prior bad acts and criminal misconduct denied him his constitutional right to due process. This claim encompasses three categories of objectionable testimony: (1) indirect character evidence, (2) evidence of prior criminal misconduct, and (3) personal admissions of misconduct.

In his brief the defendant asserts that the trial court allowed the state to introduce prejudicial and irrelevant testimony concerning his character, the sole purpose of which was to prejudice the jury. All of this testimony was repro-

duced verbatim in the defendant's brief. In general, it concerned the following areas: it was established that the defendant had purchased, at a cost of approximately $2800, a red, heart-shaped bed for his apartment; that the apartment was used by the defendant as a "playpad"; that a delivery man who testified at the trial was paid, "in cash," approximately $980; that the defendant had a large amount of cash in a briefcase in the apartment; that at the time of his arrest there were several other guns, besides the one with which the deceased was killed, on a table in the apartment; and that the defendant had a "more than ample" supply of liquor in his apartment.

Evidence of character (bad or good) is usually introduced or excluded for the purpose of proving that on a particular occasion the defendant acted in keeping with his disposition. McCormick, Evidence (2d Ed.) §190, p. 447; State v. Martin, 170 Conn. 161, 365 A.2d 104 (1976); State v. Blake, 157 Conn. 99, 104, 249 A.2d 232 (1968).

The state may not introduce evidence of the bad character of the defendant when

offered merely to show that he is a bad man and hence more likely to commit a crime. McCormick, op. cit. §191.

The testimony specifically complained of in the defendant's brief did not go to establishing that the defendant had the propensity to commit murder (the crime for which he was being tried): the defendant does not point to any evidence introduced as to his propensity to violence or aggressive behavior. Rather, it is testimony that went more to life-style than to character traits. Moreover, as an examination of the transcript reveals, trial counsel objected to all of the testimony in question on the ground that it was irrelevant and prejudicial. Evidence that is excludable for one purpose may be admissible for other purposes. 1 Wigmore, Evidence (3d Ed.) §215; State v. Simborski, 120 Conn. 624, 631, 182 A. 221 (1936). In supporting the admissibility of the evidence here in question, the prosecution asserts it was relevant to show that the defendant had a motive for killing the deceased, and to show the circumstances present at the time of the homicide.

"As to the prejudicial effect of the testimony, the trial judge, in the exercise of judicial discretion, must decide whether the probative value of the testimony outweighs the prejudice likely to result from its admission. State v. Ralls, 167 Conn. 408, 417, 356 A.2d 147; State v. Moynahan, 164 Conn. 560, 597, 325 A.2d 199." State v. Martin, supra, 166. The determination of relevance, moreover, must be made according to reason and judicial experience. Robinson v. Faulkner, 163 Conn. 365, 371, 306 A.2d 857 (1972). This determination requires the exercise of the court's discretion. State v. Blyden, 165 Conn. 522, 531, 338 A.2d 484 (1973).

This court expressed the criteria for determining whether the trial court had abused its discretion in State v. Martin, supra, 166: "'In determining whether there has been an abuse of discretion, every reasonable presumption should be given in favor of the correctness of the court's ruling....Reversal is required only where an abuse of discretion is manifest or where injustice appears to have been done.' State v. Brown, 169

Conn. 692, 702, 364 A.2d 186. '[T]he ultimate issue is whether the court could reasonably conclude as it did.' DiPalma v. Wiesen, 163 Conn. 293, 299, 303 A.2d 709."

Trial counsel objected to the materiality of the testimony as to the purchase and cost of the bed, not to its prejudicial effect. This testimony was relevant in that it established how and why the delivery men were in the defendant's apartment at the time of the shooting and any bias or motive that they might have for testifying. The defendant's objection to Detective Wearing's testimony that the defendant told him he intended to use his apartment as a "playpad" was that it was immaterial. This testimony, although bordering on the suggestive, was not irrelevant as it explained the presence in the apartment of the deceased, the defendant himself, and diverse witnesses who ultimately testified at the defendant's trial. The testimony as to the presence of a great deal of cash in the apartment and its being used to pay for the bed was not irrelevant, as objected to, because it went to establish what was claimed by the

state to be the defendant's motive. The testimony as to the guns was not objected to at trial. Detective Wearing in describing the apartment as he saw it when investigating mentioned that "[t]here was whiskeys, beers." This was in response to a question about what was in the defendant's den. The answer was not inherently prejudicial, and the defendant did not object. The state is not obliged to present evidence of a homicide in a vacuum; a description of the area where it occurred, the persons present and the activity in progress at the time of a killing are not irrelevant to the matter in issue.

Finally, in its charge to the jury,[3] the court strongly cautioned that the defendant was on trial for murder, not for

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3 "You may or may not agree with his life style. You may or may not like the man. You may or may not like his moral character. But he is not on trial for any of these things. He is on trial for murder and for the lesser included criminal homicide charges. You may not hold against him, so to speak, these things about his life which you do not like and with which you do not agree because he is not on trial for those. You may not punish him because you think or suspect he may be involved in other illegal activities because he is not charged with that

his life-style. This charge more than compensated for any prejudicial effect the testimony in question might have had.

The defendant also complains that the court permitted the state to introduce testimony showing the defendant had been involved in prior criminal misconduct. The evidence in question included: (1) testimony by a police officer that he had known the defendant in his professional capacity as a policeman prior to the defendant's arrest for the shooting of the deceased; (2) testimony by a cousin of the deceased who testified that he sold narcotics for the defendant; (3) the hear-

say recollections of the deceased's sister who testified that her brother was selling narcotics for some unnamed person.

On redirect, the prosecution asked the arresting officer if he, "as a police officer," knew the defendant prior to the shooting of the decedent, Thomas McDuffie. After the detective had answered affirmatively, defense counsel objected on the grounds that it was not brought up in cross-examination. The response was not objected to as being irrelevant or excludable as evidence of prior criminal conduct. There was no exception taken. We are not referred to any other portion of the record or transcript relating to this piece of evidence. It is impossible for this court to rule on whether the trial court abused its discretion in making an evidentiary ruling when there is no record. O'Connor v. Dory Corporation, 174 Conn. 65, 71, 381 A.2d 559 (1977).

The state called the cousin of the deceased and he testified that he worked for the defendant. The defendant's counsel objected to this evidence as immaterial to the shooting of the victim.

here. And if that is so, then that will be up to the law to take its course in the normal course in another [sic] proceedings. He is not on trial here for that and your verdict should not reflect that except insofar as you find that any of those facts or any of that conduct is relevant to the charge here which is the charge of murder and lesser included criminal homicide charges. You may find that some of the evidence is relevant on questions of motive. And I think most of it was offered on that ground, on the claim of tending to show a motive. And for that purpose, insofar as it is relevant, you may consider it. But just keep in mind that he is not on trial for those particular matters."

After objection and exception, the witness testified that he and the deceased were employed by the defendant as sellers of marihuana, that the defendant ran a large drug-selling operation employing only "younger kids." He also testified to the defendant's other holdings and activities. He further testified that a week before McDuffie's death, the defendant slapped and kicked McDuffie because he had made a mistake on money earned from selling marihuana. In the course of that argument, the witness testified that the defendant had told McDuffie he would be killed if he held out.

The central issue in this trial was whether the killing was intentional or accidental. While the state is not obligated to prove motive as an element of murder, the presence of a motive would be relevant to proving intent. State v. Hoyesen, 154 Conn. 302, 307, 224 A.2d 735 (1966). The prosecution's theory was that the defendant killed McDuffie, who was one of the defendant's runners, because McDuffie had been holding back money from him from his narcotics sales. All of the

testimony[4] complained of tended to prove that the defendant was involved in the narcotics trade and that the deceased worked for him as a pusher. This testimony fits within an exception to the prohibition against evidence of prior criminal conduct: it concerns motive. See State v. Jenkins, 158 Conn. 149, 152-53, 256 A.2d 223 (1969). Since it has the probative effect of showing motive, the trial court did not abuse its discretion in ruling it relevant and admissible.

The sister of the deceased testified that he was selling narcotics for some unnamed person. In the court's charge to the jury this testimony was stricken. In so doing, the court mistakenly stated that the sister had stated that the deceased had told her "he sold marihuana for the defendant." This stricken evidence and the inadvertent slip by the court cannot be viewed as prejudicial error in view of the entire evidence in the case and the charge taken as a whole.

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4 The objection at trial to the above testimony was that it was irrelevant or hearsay; defense counsel did not object at that time to it as being evidence of prior crimes.

The defendant further contends that, in addition to the admission of evidence attacking his character and evidence pertaining to prior criminal misconduct during the presentation of the state's case, the court allowed the state to offer similar evidence during its cross-examination of him. The defendant cites no cases supporting his argument other than in the abstract, but insists that the admission of this testimony prejudiced the jury against him. The defendant specifically complains that the court allowed the state to offer evidence as to: the defendant's annual income and its source; the presence of large amounts of cash in the defendant's apartment; the defendant's possession of a rifle, capable of firing multiple shots like a machine gun; the defendant's possession of a late-model, red Cadillac convertible; the defendant's conviction for car theft and for selling liquor without a permit; the prior arrest of the defendant for failure to pay a gas station attendant for gasoline; the presence of narcotics in the defendant's car and in an apartment house owned by him; and the possibility that because of the

defendant's gambling he might be evading income tax.

"It is well established that when a defendant takes the stand and testifies in his own behalf he may be cross-examined concerning prior convictions for the purpose of impeaching his credibility as a witness in the same manner as any other witness. Spencer v. Texas, 385 U.S. 554, 87 S.Ct. 648, 17 L.Ed.2d 606." State v. Marquez, 160 Conn. 47, 52-53, 273 A.2d 689 (1970).

"It has long been the law in this state that inquiries on cross-examination are 'in a measure, discretionary with the trial court.' Spiro v. Nitkin, 72 Conn. 202, 205, 44 A.13. The trier is often called upon to weigh the question whether the prejudicial tendency of evidence outweighs its probative value. In a criminal trial, evidence which tends to prove the commission of other crimes by the accused does not render it inadmissible if it is otherwise relevant and material. See State v. Holliday, 159 Conn. 169, 172, 268 A.2d 368.... See State v. Harris, 159 Conn. 521, 531, 271 A.2d 74. It is enough to say that the trial judge is the arbiter

of the many circumstances which may arise during a trial in which his function is to assure a fair and just outcome. We believe that if a defendant testifies and, thereafter, evidence of a prior conviction is offered under circumstances in which its prejudicial effect far outweighs its materiality and relevancy on the issue of credibility in a criminal trial its admissibility should be determined by the exercise of a sound judicial discretion." State v. Marquez, supra, 52.

Other than exploration of credibility, the scope of cross-examination is limited to the subject matter of the direct examination. Grievance Committee v. Dacey, 154 Conn. 129, 150, 222 A.2d 339 (1966); Mendez v. Dorman, 151 Conn. 193, 198, 195 A.2d 561 (1963).

In his brief the defendant objects to the allowance by the trial court of testimony about the presence of large amounts of cash in his apartment. He claims that the testimony was elicited from the defendant on cross-examination. The portion of the transcript he refers to, however, is testimony given by a defense witness. Since this example does not

support the defendant's claim that his testimony on cross-examination was used as substantive evidence instead of impeachment evidence, we will not consider it further.

The defendant claims error in the trial court's admission of testimony as to what type of car he had. Defense counsel objected on the grounds that it was immaterial. The trial court ruled it was relevant and admissible. The portion of transcript referred to by the defendant contains testimony to the effect that a defense witness who had testified that the deceased was killed accidentally when the defendant was twirling the gun involved in the shooting was asked on cross-examination if he drove the defendant's car. There was an objection and the state responded that the witness indicated a business relationship with the defendant and that the state was only pursuing that relationship. The relevancy of this testimony may not be immediately apparent but its admission was within the discretion of the court. Spiro v. Nitkin, supra, 205.

The references made to prior convictions and arrests were all objected to as

being irrelevant. As we stated previously, it is within the discretion of the trial court to rule on the relevancy of evidence tending to prove the commission of other crimes. State v. Marquez, supra, 52. The state claimed that all this went to establishing motive, i.e., that the defendant was dealing in drugs, gambling and the illegal sale of liquor, that the deceased was one of his drug pushers and that the defendant killed him for holding back money from him. The testimony as to the presence of drugs in the defendant's car and in his wife's apartment also was relevant to establishing motive in that it showed the milieu in which the defendant operated. The evidence of the possibility of income tax evasion went first to the defendant's credibility which he had put in issue by taking the stand; State v. Marquez, supra; and second to the establishing of motive. The defendant objected to the admission of the evidence as to his possession of a rifle on grounds of relevancy. The previous evidence had indicated that the defendant had a rifle in the apartment in which the shooting took place. The state asked the defendant if

he could fire a series of shots with the rifle. Upon objection, the state claimed that there was previous evidence of a machine gun and the only purpose was to clear up whether a rifle might be inferred to be a machine gun. The court did not abuse its discretion in the ruling.

After examining all of the above testimony in its context in the transcript, we hold that the trial court did not abuse its discretion in holding that its probative value outweighed its prejudicial tendency.

In his next assignment of error, the defendant raises a fourth amendment claim as to the admission of testimony concerning a briefcase that he contends, for the first time on appeal, was unlawfully seized.[5] We find that that assignment of error has no merit.

During the state's direct examination of Lieutenant Thomas P. Muller, one of the officers who investigated the killing, the prosecution inquired about

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5 There was no attempt to enter the briefcase and its contents, "$2000 in cash," into evidence. So its search and seizure, apart from the testimony, is not an issue here.

the presence of other people in the defendant's apartment and what they were doing. In response, Lieutenant Muller began to testify that there was a female with a briefcase who was trying to leave the apartment as he was entering. Defense counsel immediately objected to this testimony as being "immaterial." The prosecution claimed it on the ground that it was material and relevant to establishing motive. At this point the jury were excused and the officer was allowed to testify, in response to questioning by both the prosecution and defense, that the briefcase the woman was carrying contained $2000 in cash, that he opened it without a warrant and that there was no blood on it or anything of that nature. Defense counsel objected on the ground that the testimony[6] was immaterial: "I will still object on the claims of immateriality. I see no connection between the money and the charge." In response, the prosecution

6 Defense counsel also initially objected to the testimony because there was no warrant to take the suitcase, but abandoned this claim and did not resurrect it again until this appeal.

asserted its materiality to the issue of motive: "[By assistant state's attorney John J. Kelly] I am claiming, your Honor--your Honor, this is one other fact the jury is entitled to consider in this case in reaching its conclusion. It may very well be. And they may find it to be material and relevant on the issue of motive. Number two, I believe your Honor has raised a point that I was about to, namely I don't believe there is any standing on this case on the part of Mr. [Earl] Williams to raise this issue. We are not claiming it was taken from his client but from the female." The defense's final objection was "on the claims of immateriality." The court directly overruled the defense's objection: "[By the court] Of course at this early stage we really don't know completely. But as I understand, this is a situation where there was a shooting there and there is a question of why it happened and how it happened. And the state claims it as some evidence possibly in the link or chain that shows some motive. And under the circumstances, I think it ought to be admitted so I am going to overrule your

objection." As can be seen by the court's language, the defense's objection was addressed to the immateriality and irrelevance of the testimony, not to the fact that it was the fruit of an illegal seizure. It should be noted that the defendant never filed a motion to suppress at pretrial as required by statute. See General Statutes §54-33f; Practice Book, 1978, §824. Nor did he indicate by his objections to the testimony that he wished it suppressed as an infringement of the defendant's fourth amendment rights. The defendant argues now that the trial court's ruling was based on an erroneous determination that the defendant lacked standing to challenge the warrantless seizure of the briefcase. As illustrated above by the excerpts from the transcript, the trial court specifically ruled in response to the defendant's direct objection that the testimony was admissible because it was material and relevant.

Under State v. Evans, 165 Conn. 61, 69, 327 A.2d 576 (1973), as we have noted before in this opinion, this court will review errors of constitutional dimension even if not raised at the trial court only

where "exceptional circumstances" exist, i.e., (1) a new constitutional right has arisen between the time of trial and appeal, or (2) the record adequately supports a claim that a litigant has clearly been deprived of a fundamental constitutional right and a fair trial. State v. Evans, supra, 70. The instant claim fits neither criterion. There is no new constitutional right claimed and the record does not present a claim that the defendant was deprived of a fair trial. The issue was the relevancy of the testimony. That is not an issue of constitutional dimension, but rather of the trial court's discretion. State v. Blyden, 165 Conn. 522, 531, 338 A.2d 484 (1973). On the record presented, we find that the trial court did not abuse that discretion.

The defendant's final claim of error is that he was denied due process of the law when the jury unreasonably and illogically inferred from his conduct that he intended to murder the deceased. The prosecution has rephrased and answered this rather oblique claim as if it were a challenge to the trial court's refusal to grant the defendant's motion to set aside

the verdict. We will address it in this manner also.

"When a jury verdict is challenged on the ground that the evidence is insufficient to sustain a verdict, the issue is whether the jury could have reasonably concluded, upon the facts established and the reasonable inferences drawn therefrom, that the cumulative effect of the evidence was sufficient to justify the verdict of guilty beyond a reasonable doubt. State v. Jones, 173 Conn. 91, 376 A.2d 1077; State v. Chetcuti, 173 Conn. 165, 172, 377 A.2d 263. In ruling on such a motion, the evidence presented at the trial must be given a construction most favorable to sustaining the jury's verdict. State v. Chetcuti, supra. If, however, the evidence is insufficient to meet the burden of proof of guilt beyond a reasonable doubt, bearing in mind that the state has the burden of establishing by such proof every essential element of the crime charged, the verdict must be set aside. State v. Benton, 161 Conn. 404, 406, 288 A.2d 411; State v. Kelsey, 160 Conn. 551, 553, 274 A.2d 151; State v. McGinnis, 158 Conn. 124, 129, 256 A.2d 241." State v.

Jackson, Conn. (40 Conn.L.J., No. 21, pp. 3,5) (1978). There is no distinction between direct and circumstantial evidence so far as probative force is concerned. State v. Chetcuti, supra, 172; State v. Cari, 163 Conn. 174, 179, 303 A.2d 7 (1972).

In the present case, the defendant admitted that he shot McDuffie, but claimed that the shooting was accidental: unaware that the gun had been placed in a ready-to-fire status, the defendant twirled it while pointing it at the decedent and it went off. In order to prove that the shooting had not been accidental but, rather, intentional as required for a finding of guilt under §53a-54a(a), the state relied most heavily on the testimony of one Marc Anthony Ford, a cousin of the victim, who claimed that both he and Thomas McDuffie had been teenage dealers of marihuana for the defendant; that approximately one week prior to the shooting of McDuffie, Ford had observed the defendant beating and kicking the smaller McDuffie because the latter had been "shorting" him (i.e., holding back proceeds) on drug sales made by McDuffie for

the defendant. Ford also testified that he heard the defendant tell McDuffie, at the time of the beating, that he would be "capped" (i.e., shot) if he continued to "short" the defendant. Thus, the question of a possible motive was injected into the case.

The other particularly damaging testimony against the defendant came from the expert testimony of James McDonald, the director of the South Central Regional Crime Laboratory, who conducted various tests with regard to the handgun the defendant admitted he shot the victim with. McDonald testified that in order to fire the Colt .45 semiautomatic handgun, one would first have to load a seven-cartridge magazine and insert same into the grip area of the weapon. Also, before the gun could be fired, one would have to pull back a slide near the finger grip. There is also a grip safety feature on the gun which must be depressed before the weapon can be fired. If the grip safety is not depressed, the weapon will not fire, even if the trigger is pressed. Similarly, the jury were told that the weapon requires six pounds of pressure on the trigger

before it may be fired, what McDonald testified was a "pretty safe trigger squeeze." In sum, the jury were obviously left to draw the inference that the murder weapon had not and could not have gone off by the mere act of "twirling" (as the defendant claimed) but would discharge only after elaborate steps had been taken. As McDonald testified, the gun was not capable of being discharged accidentally.

McDonald also testified about gunpowder residue tests he conducted on a bandana worn on the head of the victim and stated, based on his testing, that the muzzle of the murder weapon had been within eighteen inches of the bandana (and the victim's head) when the weapon was fired. This was in contradistinction to the testimony of the defendsant that he had been in the doorway of the den, approximately seven feet from where the victim fell, at the time of the shooting. McDonald testified that it would be physically impossible for gunpowder residue to be on the bandana worn by the victim if the defendant had been the approximately seven feet from him that he claimed.

Intent is an element of the crime of murder with which the defendant is

charged. General Statutes §53a-54a; State v. Crawford, 172 Conn. 65, 372 A.2d 154 (1976); State v. Biting, 162 Conn. 1, 291 A.2d 240 (1971). The state had the burden of proving it beyond a reasonable doubt. State v. Beauton, 170 Conn. 234, 241, 365 A.2d 1105 (1976); Patterson v. New York, 432 U.S. 197, 97 S.Ct. 2319, 53 L.Ed.2d 281 (1977); Mullaney v. Wilbur, 421 U.S. 684, 95 S.Ct. 1881, 44 L.Ed.2d 508 (1975); In re Winship, 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970).

It is within the province of the jury to draw reasonable and logical inferences from the facts proven. State v. Pundy, 147 Conn. 7, 12, 156 A.2d 193 (1959); State v. Foord, 142 Conn. 285, 294, 113 A.2d 591 (1955). Our inquiry is directed to whether, on the facts established and inferences reasonably to be drawn therefrom, the verdict can be supported. State v. Benton, 161 Conn. 404, 410, 288 A.2d 411 (1971).

On the basis of the expert testimony as to the impossibility of the gun going off accidentally, the evidence of motive, and the defendant's admission of killing, the jury were justified in finding that

the state had proved the guilt of the defendant beyond a reasonable doubt.

There is no error.

In this opinion the other judges concurred.

APPENDIX B

STATE OF CONNECTICUT

No. 20766

STATE OF CONNECTICUT — SUPERIOR COURT

vs. — NEW HAVEN COUNTY

ROBERT MOYE — DECEMBER 17, 1976

PRESENT, Hon. James F. Stapleton, Judge.

JUDGMENT

Upon an indictment laid before the Grand Jurors of New Haven County, duly impanelled and sworn by Arnold Markle, Attorney for the State, within and for said County on November 3, 1975, charging Robert Moye with the crime of Murder, said Grand Jurors on said November 3, 1975 endorsed a true bill as to the crime of Murder as more fully appears by said indictment, and thence to November 4, 1975 when the defendant made an oral Motion to set bond, which oral Motion was granted by the Court (Alexander, J.) and bond set at $100,000., and thence to November 5, 1975 when the defendant filed a Motion to reduce bond, which Motion the Court (Levine, J.) granted and reduced the bond to $25,000., and thence to December 16, 1975 when the Court (Mulvey, J.) granted

the Motion of the defendant for permission to inspect weapon and conduct tests, and ordered that the defendant be granted the right to have said gun examined and test fired, by a gun expert in the presence of the State, and thence to December 17, 1975 when a Bill of Particulars and Discovery were filed as ordered by the Court on December 16, 1975, and thence to the present time when a document stating possible verdicts was filed, and when all the evidence having been submitted said action was committed to the Jury who returned a verdict of Guilty at 3:30 p.m., which verdict was accepted and ordered recorded by the Court, and thence to November 18, 1976 when an oral Motion to revoke bond was made, which the Court (Stapleton, J.) granted, and thence to November 19, 1976 when the defendant filed a Motion to set aside said verdict, and thence to the present time when the parties appeared and were heard by the Court on said Motion, and when the Court denied said Motion, and thence to the present time when the defendant appeared.

Whereupon it is adjudged that the prisoner suffer imprisonment in the

Correctional Institution, Somers, for a term of not less than eighteen (18) years, to life.

BY THE COURT,
Leonard J. Gilhuly,
Asst. Clerk

APPENDIX C

NOVEMBER 18, 1976

RELEVANT PORTION OF CHARGE TO JURY

Now, starting with murder, the accused, of course, is, as I read the indictment, charged with the murder of Thomas McDuffie. Now, our statutes provide as follows: with respect to murder: A person is guilty of murder when, with intent to cause the death of another person, he causes the death of such person. And that is it. That is the statute on murder. It is very simple, at least it appears to be simple and very brief and very short. It just says if you kill someone else intending to kill him. It is an intentional act. It requires a specific intent, you kill someone else intending to cause his death, intending to kill him. And that is the essential elements of the crime of murder, that you cause the death of another person and that you intended to do it. The old law, you have heard about it or read about it in books or on T.V., about deliberation and premeditation and all that, and malice aforethought, there is no such thing. That is all out the window. That isn't

anything to be considered. It never meant anything anyway, no one could understand it. It has all been abolished and it is a very direct test. You kill someone else with intent to cause his death.

Now, by implication in this law, the person causing the death must be of sound mind, legally sane. You would also have to find that the defendant was legally sane at the time. Now, in the law there is a presumption that everyone is sane unless and until some evidence is introduced that he is not sane. And as I recall the evidence here, that was not an issue. No evidence was ever introduced that the defendant was not sane. So for purposes of your deliberations, you may assume and conclude that the defendant was sane because there has been no evidence in the record to the contrary and there is such a presumption of that.

Now, the defendant testified and he stated to you clearly, as all of the other witnesses that were there, that the defendant shot and killed the deceased, Thomas McDuffie. So it seems to me you have no great difficulty with that element of the crime. The defendant did shoot him. The real question on the charge of

murder is the question of intent. Did he intend to do it or was it an accidental shooting as the defendant claims? Now, intent is a mental process. A person's intention may be inferred from his conduct. Every person is presumed to intend the natural and necessary consequences of his own actions. It is often impossible, and never necessary, to prove criminal intent by direct evidence. Ordinarily intent can be proved only by circumstantial evidence.

Now, what do we mean by these terms, direct evidence and circumstantial evidence? Direct evidence -- there was direct evidence in the case that Mr. Moye shot Mr. McDuffie. There were witnesses who were there who saw it, who saw the gun go off, who saw the defendant fall. That is direct evidence. They were there, they saw it and they testified about it. Circumstantial evidence is indirect evidence. Testify about one fact, a witness does, that he saw which leads you to infer or conclude the existence of some other fact. The classic illustration is the cat and the mouse in the box. You take a box and you put a cat and a mouse

in it and you seal it up and you come back ten minutes later and the mouse is gone and there are no holes in the box. Well, there is no direct evidence about what happened to the mouse but you will infer there is circumstantial evidence that the cat ate the mouse because the mouse isn't there any more. It is circumstantial evidence now, that is as opposed to direct evidence.

Now, as you can imagine on the question of intent you are dealing with what is in a person's mind, his purpose or intention. And that is necessarily very largely a matter of inference. Now, a person may take the witness stand, as the defendant has done here, and testify directly. That is direct evidence as to what was in his own mind and what his own purpose or intention was. And that testimony you may believe or not believe according to whether or not it warrants belief. But no other witness can be expected to come forth and testify that he looked into another person's mind and saw therein a certain purpose or intention. The only way in which a jury can determine what a person's purpose or intention was

at any given time, aside from his own testimony, is by determining what his conduct was and what the circumstances were surrounding that conduct and from these infer or conclude what his purpose or intention was. The evidence as to how it happened, the entire circumstance and, of course, the question of motive would be most important on the issue here of intent. I think this is where motive would come into the picture as some evidence dealing with the question of intent. Again, it is not an essential element. The State doesn't have to prove motive but you may want to know what the motive is before you could conclude under these circumstances what a person's intent was.

Now, to draw inferences, such an inference as I have been talking about, is not only the privilege but it is also the duty of a jury provided, of course, the inference drawn is a reasonable one. In this case, therefore, it will be part of your duty to draw all reasonable inferences from the conduct of the accused in the light of all the surrounding circumstances as you find them to be as to what purpose or intention was in his mind at

various times.

Now, you have heard the evidence of the State. I am not going to repeat it all. Their claim, essentially, is that there had been a prior dispute between the accused and the deceased over the sale of drugs, and that the deceased was holding out money on the defendant. That is the State's claim, and that this was the motive and that this killing was an intentional one. The defendant says it was accidental, that he was fooling with the gun and it went off accidentally and he didn't deal in drugs and had no hard feelings against the defendant and no reason to kill him intentionally and he did not do it intentionally. And that is really the issue on the question of murder.

State v. Robert Moye
Tr. pp. 1196-1201

APPENDIX D

NO. 8499

State of Connecticut	SUPREME COURT
vs.	STATE OF CONN.
Robert Moye	May 31, 1979

O R D E R

The defendant's Motion to Reargue having been presented to the court it is hereby

ORDERED denied.

By the Court,

Thomas H. Abraham
CHIEF CLERK OF
SUPREME COURT

Supreme Court, U. S.
FILED
SEP 13 1979
MICHAEL RODAK, JR., CLERK

In The
Supreme Court Of The United States

OCTOBER TERM, 1979

NO. 79-274

ROBERT MOYE, *Petitioner*

v.

STATE OF CONNECTICUT, *Respondent*

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

RESPONDENT
STATE OF CONNECTICUT

ERNEST J. DIETTE, JR.
Assistant State's Attorney
Office of the
Chief State's Attorney

REASONS FOR DENYING THE WRIT

Although it cannot be conceded outright that the decision by the Supreme Court of the State of Connecticut, in *State v. Moye*, Conn. (40 Conn. L.J. No. 46, pp.1-10, May 15, 1979), would have been decided differently if the court had h[illegible] the advantage of this Court's decision in *Sandstrom v. Montana*, U.S. , 25 Cr.L.3159, June 18, 1979, there would appear to be at least a reasonable possibility that the court's decision in *State v. Moye*, supra, would have been different.

The Supreme Court of Connecticut's decision–after *Sandstrom v. Montana*, supra–in *State v. Harrison*, Conn. (41 Conn. L.J. No. 9, pp.3-6. August 28, 1979), readily indicates an awareness by that state court of the *Sandstrom* decision and its applicability, in general, to charges in which the jury is told that "...the law presumes that a person intends the ordinary consequences of his voluntary acts..."

In a footnote (T.N. #5 at p.6), in the *Harrison* decision, the Supreme Court of Connecticut merely mentions, sans further comment, that *State v. Moye* was decided before the court could have known of this Court's decision in *Sandstrom*. The implication is clear that that court might, indeed, have reached a different conclusion in *Moye* if it had known of *Sandstrom*.

This being the case, the issue, then, on this Petition for a Writ of Certiorari, seems to be not whether further action on *Moye* is required but, rather, which court ought to have the initial opportunity to apply *Sandstrom* to the facts in *Moye*.

Since the Supreme Court has already rendered a decision of far reaching implication in *Sandstrom*, petitioner's request that this Court consider the substantially identical issue again, in *Moye*, would seem to

request an effort (akin to "re-inventing the wheel") extremely wasteful of this Court's already over-burdened judicial resources.

The wiser course might be that this Supreme Court summarily refer the *Moye* case back to the Supreme Court of the State of Connecticut in light of the Court's decision in *Sandstrom v. Montana*, supra.

Once the *Moye* case has been returned to the state court for further review, that court could expeditiously proceed to a determination of at least two issues which this Court should not–at this time–be called upon to decide; i.e., (a) the retroactive effect of *Sandstrom* and, (b) a review of the entire charge in *Moye*, in light of the principles enunciated in *Sandstrom*, provided, of course, that the question of "retroactivity" is not decided adversely to petitioner, such that the latter question becomes irrelevant.

A determination in petitioner's favor, at the state court level, would not be the foregone conclusion that petitioner has so facilely declared. For, as this Court has only recently ruled in a similar case, *Kentucky v. Whorton*,____U.S.____, 25 Cr.L. 3082. (May 21, 1979), the charge discussed in *Sandstrom* is not talismanic, and each charge must be read as a whole to determine the extent to which a conclusive presumption or burden-shifting may have occurred.

It should be left to the Supreme Court of the State of Connecticut, however, to perform this balancing-test evaluation in the first instance.

CONCLUSION

On the basis of the foregoing, this Court should deny the Petition for a Writ of Certiorari to the Supreme Court of the State of Connecticut. It may be appropriate, however, to remand this case to the state court for further proceedings in light of *Sandstrom v. Montana*, U.S. (1979).

Respectfully Submitted,

RESPONDENT
STATE OF CONNECTICUT

By: ARNOLD MARKLE
State's Attorney
New Haven County

ERNEST J. DIETTE, JR.
Assistant State's Attorney
Office of the
Chief State's Attorney